Supreme Court, U.S.
FILED
MAY 6 2002
OFFICE OF THE CLERK

No. 01-1020

IN THE

Supreme Court of the United States

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

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May 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

PARTIES TO THE PROCEEDING BELOW

The only parties to this case are Sacramento Municipal Utility District and the United States of America. However, somewhat similar cases were also decided the same day by the Court of Appeals involving as plaintiffs Maine Yankee Atomic Power Co., Omaha Public Utility District, and Commonwealth Edison Co.

RULE 29.6 LIST

SMUD is a governmental subdivision of the State of California. It is not a "nongovernmental corporation" or a corporation of any sort.

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REPLY BRIEF FOR PETITIONER

The Government's Brief in Opposition seems to add additional reasons for granting certiorari, rather than providing any reason why it should not be granted. The Government takes certain positions, apparently necessary in its judgment to justify the decision of the split court below. Those positions are so extraordinarily broad as to require this Court's examination on certiorari.

1. "Hamlet" Without Hamlet.—The Opposition begins with a truncated overview of EPACT, said to be a "comprehensive national energy policy," which was to provide "solutions to our nuclear waste and uranium enrichment problems." Op. 3. The Government's description of EPACT and those "problems" and "solutions" somehow leaves out the formation of the Enrichment Corporation, which was to be privatized to "maximize the long-term value . . . to the treasury," [1] after being shorn of all liabilities for pollution that the Government itself created by its negligent operation of the facilities. Indeed, the Enrichment Corporation is never mentioned in the Opposition; neither is there any comment about whether the rules laid down in retrospectivity cases involving the Government as umpire between private interests, like *Turner Elkhorn* and *Eastern Enterprises*, are applicable to cases where the retroactive assessment involves self-dealing on the part of the Government. The only inference to be drawn is that the Government is saying that the self-dealing aspects of the case are to be completely ignored and that the Government can legislate retrospectivity whenever it is "rational" for it to do so in *its* interests. But it is always "rational" to escape your responsibilities when you can get away with it; so the Government's standard would leave the Court without moorings to test the constitutionality of retroactive legislation.

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[1] *See* the statutory provisions at Pet. 6 n.5.

2. The Polluter Can Collect from Its Customers to Remediate the Polluter's Pollution.—The Government seems to say that the reason SMUD asserts that the Government should bear the entire expense of the cleanup of the Government's own facilities is because the Government was the first to make use of uranium processed at the facilities. Op. 26. While it is true that the Government was the first user, and for many years the only user, and that its military needs have required a much higher degree of enrichment than that necessary to produce boiler fuel (Pet. 3), that is not the basis of SMUD's position. The basis is that the Government owned the facilities, lock, stock and barrel, and itself ran them, at all pertinent times. It was not necessary that the facilities produce pollution of themselves and the surrounding air, water and land, that could not be promptly remediated. Clearly the new operator of those facilities is expected to manage the potential for pollution on a current basis, rather than creating and letting it accumulate for decades as the Government did as operator. The Government made a public apology for its behavior.[2]

The Opposition seeks to make the Government's role as operator invisible. Thus, the Government never answers the basic question: since the Government ran the whole enrichment operation as it saw fit, why is any retrospective exaction that reduces the need to draw on the Government's general funds consistent with the Constitution at all? The Government says that SMUD should have anticipated that it would be required to help clean up the pollution in due course, even years after it ceased doing business with the Government. The common law of nuisance and CERCLA are cited.

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[2] *See* Pet. 21 n.19. The SMUD Complaint alleged that the Government was negligent, grossly negligent, reckless and deliberate in its pollution of the facilities. J.A. 24-25, 38-39. The Government accepted those assertions by moving to dismiss for failure to state a claim; the Government escaped discovery as a result. It ill behooves it now to suggest that the polluted condition of the plants was unavoidable. Op. 17-18.

Op. 22-23. There is nothing in the law of nuisance, however, that says that a party operating a nuisance can collect from its customers its costs of cleaning up the nuisance that it, the operator, maintained. A slaughterhouse keeper improperly running an operation that results in unremediated pollution, or a gasoline station that does the same, cannot retrospectively collect from its customers over the years a contribution toward the cleanup costs. Nothing in CERCLA or in the common law remotely so provides.[3] In 1971-81 no one could reasonably expect that the Government would try to collect from its customers unless tyrannical behavior was to be assumed.

If we took a schizophrenic view of the Government, and treat its enactment of EPACT as a sovereign act and its commercial activities as those of a stranger, we would still have the result that the clear intent of the statute was to take away the right of indemnification, or of 100% contribution, that a totally innocent party would have against a polluter—assuming that for some obscure reason the innocent party were held liable, in whole or in part, for the acts of the polluter. The act of the "sovereign" in deliberately destroying that right would be a classic taking of legal rights, compensable under the Takings Clause under *Armstrong v.*

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[3] CERCLA is irrelevant to this case. First, CERCLA was not enacted until December 1980, nine years after SMUD started to purchase the services from the Government and only a few months before it stopped purchasing. Even then, the full breadth of CERCLA's liability was not revealed for several years after enactment, as the Government's cost recovery cases worked their way through the federal courts. Second, the Government does not assert that SMUD could be held liable for cleanup of the Government's facilities under CERCLA. SMUD is plainly *not* a responsible party under CERCLA. As the owner and operator of the uranium enrichment facilities, the *Government* is responsible for the environmental cleanup under CERCLA. 42 U.S.C. § 9607(a)(1). Rather than supporting the Circuit's conclusion that SMUD should have expected such liability, CERCLA undercuts it. Despite its sweeping breadth, not even CERCLA goes so far as to make a party in SMUD's position liable.

United States, 364 U.S. 40 (1960). Either way, the Government's role here as sole polluter cannot be ignored any more than the commercial moneymaking aspects of the EPACT-established Enrichment Corporation.[4]

3. The Customer as Facilitator.—The Government contends that the customers of the Government's commercial sales of enrichment services ought to pay because they received "benefits" from the services. That principle would take us as far as all outdoors. It is a commonplace of economics that in a free economy all commercial exchanges take place because the two counterparties each perceive a benefit to themselves in the exchange. If they did not both perceive a benefit, there would be no exchange. The Government thus treats those who are customers of a culpable party—that did not have a conscientious program of proper disposal for controlling potentially toxic materials—as facilitators of the polluter, appropriately liable not only to the public, but to the polluter itself to lighten his burden. Thus, the Government confirms that the examples we gave in the Petition are completely germane: their theory is that it *would* be perfectly constitutional for Congress to assess frequent

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[4] The Government cites the "pass-through" provisions of the statute as denaturing the retrospective character of the statute, perhaps by spreading the pain to SMUD's current customers, themselves innocent. Op. 5. The Government later seems to say that the pass-through is irrelevant. Op. 15-16. Further on, the issue comes back to life. Op. 17. Anyhow, the pass-through provisions do no good for SMUD; its rates are not regulated at all; and what it feels it must charge, it charges; but like other unregulated parties, it does so at the risk of losing its customers in one way or another. The leading antitrust cases universally reject "pass-through" as a defense, recognizing the invalidity of this argument in economic and legal terms. *Hanover Shoe, Inc. v. United States*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 437 U.S. 720 (1977). The argument also completely ignores the deregulation of the electric power industry, and the ability of many users to obtain power from alternative sources than their local utility. "Pass-through" cannot cure a constitutional infirmity. *Cf. Eastern Enterprises*, 524 U.S. at 531 (indemnity no cure).

flyers retrospectively to pay for the bailout of the improvident airlines (Pet. 22-23); or since no distinction is to be made on the basis of self-dealing according to the Government, to retrospectively assess users of the Postal Service in accordance with their mail volumes if the Postal Service suffered a loss from mismanagement. Under the Government's view, the status of the customer or consumer would be a hazardous one, constantly at risk for targeted retrospective exactions.[5] Such an extreme view requires this Court's attention.

In an attempt to make the customers a party to the Government operator's pollution, the Government says that since "enriched uranium has long been known to be extremely hazardous," the customers of the Government's plants ought to have realized that "the enrichment process would leave a need for decontamination." Op. 17-18. The argument is a complete *non sequitur*: SMUD was responsible for the handling of the uranium once it was enriched and delivered to it, and it performed that task in a blameless fashion. The "enrichment process would leave a need for decontamination" only if the Government did not take care of the waste problem as it went along. There was no reason why it could not; and it presumably expects that the privatized Enrichment Corporation, now "USEC, Inc.," will not "leave a need for decontamination." The whole argument that "the nuclear power industry has always been strictly regulated" tells us nothing concerning SMUD's expectations as to whether the services it bought would be repriced a decade or two later, or why it should have to answer to the Government, even in part, for the mishandling of uranium by the Government when SMUD handled its uranium properly.[6] The Govern-

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[5] The notion that the customers received "below-market" pricing for the Government's services (Op. 21) is without support; the record shows that when foreign sources were available, creating a market, the Government quickly lost business. Pet. 5; ComEd Pet. 2-3.

[6] That an executive of one or more of the larger power companies expressed satisfaction with what Congress had done, relied to some extent

ment treats as "a large, unrecognized social problem" its own reckless or willful failure to deal currently with a material it characterized as "long . . . known to be extremely hazardous." Op. 21. That was not an "unrecognized social problem"; it was plain vanilla bad management in failure to clean up currently and failure to use revenues to pay for current cleanup—as indeed the statute required (Pet. 5 n.4)—and there was no basis for fobbing any of its consequences off on parties who were not responsible for it.

4. When Is a Tax Not a Tax?—The Government seems to concede that what was done here resembles a retrospective tax—and a "new" one at that —indeed, it seems to justify what was done here by reference to the taxing power. Op. 16-17. It says that it doesn't matter because it is used for a special purpose, and not for general purposes; that makes it an *assessment*. Op. 20 n.9. The argument recalls the child's notion that the dollar bill it deposits in the local bank will be kept in a separate drawer for it. Money is money. These "assessments," made retrospectively, reduce the need for conventional prospective taxes (user or broadly based), and changing their name doesn't change them from being taxes. *Cf. United States v. United Shoe Corp.*, 523 U.S. 360 (1998) (tax on exports claimed to be "harbor maintenance"). Substantially all taxes could thus be made retrospective by creating different categories of expenditure in the Federal Budget and "assessing" particular groups, based on their past

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on by the Government (Op. 4), is irrelevant. SMUD did not authorize any such statement; ours is not the corporate state of some countries between the World Wars in which the industry leaders and the dictator ordered matters for everyone else. In fact, the statements in question were made after it was evident that Congress was going to impose an even larger exaction than it did, in an effort to get Congress to decrease the amount it would "assess." A person would not lose her right to object to a bill of attainder by requesting that Congress impose a somewhat less harsh penalty than what it first considers.

activities, for them.[7] Like the Government's other arguments, this open-ended assertion underscores the need to grant certiorari. In plain English, we have here a huge, new, purely retrospective tax, of an amount and nature which this Court has never come close to encountering before.

5. The Opportunity for Further Analysis of the Constitutional Provisions Relating to Retrospective Legislation.—SMUD's Petition suggested that this case, with decades of retrospectivity, a hard-core "taking"—that is, removing an asset (here money) from the citizen's pocket and putting it in the Government's—and the specificity of the amount "taken," afforded a real opportunity to rationalize the law concerning unconstitutional retrospectivity. Pet. 25-27. This was said in the light of the *Eastern Enterprises* decision in which a majority of the Court could not be obtained, but where four justices were of the view that the Takings Clause

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[7] In fact, the special "fund" created for the assessment is not exclusively dedicated to the decontamination of the enrichment sites, but is also used to pay for the cleanup of thorium and uranium pollution by Government-contractor mining and milling operations; activities with which SMUD had no business dealings at all. The Government's contention (Op. 24 n.11) that the fund is somehow partitioned, with part of it used for decontamination of the Government facilities, and the rest used for cleanup of thorium and uranium mining/milling sites, is simply false. There is only a single trough, funded in part by the former (like SMUD) and present nuclear utilities (based solely on pre-October 24, 1992 purchases) and partly by the Government; and both the enrichment and mining/milling projects are fed from that trough. The thorium-uranium private interests push in Congress for a larger share of the Fund, and the DOE pushes back. *See, e.g.*, statement of DOE saying that giving more to the thorium miners would "mean ... that cleanup at [DOE's] gaseous diffusion plants may have to be deferred." Remediation of Uranium and Thorium Processing Sites, Hearings before Subcom. on Energy and Power, House Commerce Comm., 106th Cong., 2d Sess., at 26 (2000). The provisions of the pertinent statutes (Pet. 105a-107a) contain no provision for segregation or partitioning of the Fund so that only the Government's money is paid to the thorium and uranium millers and miners; the Government's suggestion to the contrary is incorrect.

was implicated even though what was taken was money (and not even taken for the Government's own account). Cases on the issue of when "money" is "property" within the Takings Clause seem to be in confusion. Pet. 25-27. Even the Federal Circuit says that a "retroactive tax can constitute a taking under the Fifth Amendment." *NationsBank v. United States*, 269 F.3d 1332, 1336 (Fed. Cir. 2001). Perhaps it is SMUD's common-law right of third-party recovery from the Government as polluter that is being taken; "property" beyond cavil. *See* p. 3-4, above. The Government has little to say about the analytic confusion, other than to cite the cases which show the disarray which this case affords an opportunity to resolve. Op. 13-16, 18-19.

6. The *Winstar* Doctrine Further Confused.—We suggested that the Court grant certiorari on our *Winstar* question (Question No. 2) in order to assure a complete view of the issues presented by the retrospectivity involved here. EPACT upset the result contemplated by a fixed-price contract, and in the case of SMUD and some others similarly situated, violated a release granted SMUD by the Government. *See* Pet. 5; 27-29. The Government has articulated a new basis for distinguishing this case from *Winstar*; a basis which itself seems to require attention.

The Government claims (following language in *Yankee Atomic*) that there can be no breach of a contract if the contract has been completed. It says that since SMUD's contract was fully performed, SMUD could not sue for breach. Op. 11-12. This notion was rejected over a century and a half ago in the *Dartmouth College* case, *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and brief reflection is enough to demonstrate its error.[8] Indeed, in *Winstar* itself, the contract was completely

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[8] Neither of the cited cases for this in *Yankee Atomic*, *Kirlin* and *Mulholland*, says any such thing. *Kirlin* says that a contractor cannot be compensated for a "Value Engineering Change Proposal" not used in the

performed in a sense: the plaintiffs had acquired the savings and loan assets and obligations that the Government sold, and for that the Government had given them the right to use a certain method of accounting. Why should that right be different from the right granted SMUD by the release, to be free of further demands for payment? In each case it could equally be said that there had been a completed contract. *See Wood v. Lovet*, 313 U.S. 362 (1941) (completed sale vitiated by subsequent action).

Parties can, and sometimes do, breach a contract after it is "performed." SMUD and the other Petitioners entered into fixed-price contracts with the Government and paid what was due under those contracts. SMUD, and apparently some others, obtained a release from the Government of all further obligations regarding their enrichment contracts, which included pollution provisions. The Government now takes action that increases the price of its services retrospectively and violates the release agreement. Just because those agreements were "performed" in the sense that they contemplated no further affirmative activity on the part of the contracting parties does not mean that they could not be breached by an activity (attempting to exact additional monies despite the contract and the release) which was inconsistent with the results contemplated by the contract or the release. In that sense, a contract is always to some extent "incomplete," though no further active performance is required

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The reasons for granting certiorari we asserted in the Petition are stronger than ever. The Government has taken this Court's statement of less than a decade ago that "the presumption against retroactive legislation is deeply rooted in

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contractor's contract; *Mulholland* says that the statutory time in which to make claim for reimbursement of unexpected costs runs from the time of completion of the contract. Nowhere close to the asserted point.

our jurisprudence, and embodies a legal doctrine centuries older than our republic" (*Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994)), and this Court's statement that it "does not follow, however, that what Congress can legislate prospectively it cannot legislate retrospectively,"[9] and has morphed them into the proposition that "retroactive economic legislation enjoys a presumption of validity." Op. 20. The retrospective exaction in favor of the Government is, without denial, by the Government, larger than any previously attempted. Pet. 16-17. The Government is unwilling to discuss the effect of its self-dealing on the analysis (Pet. 17-20), continuing to pass off what was done as "economic regulation." Op. 20. The ability of the polluting party to collect contribution from the blameless parties, simply because they were customers (Pet. 20-23), is presented as a controlling principle of law. Op. 20-21, 24-25. Even a "new tax" can be made retrospective for three decades—purely retrospective, not prospective at all (Pet. 23-25)—if it is called an "assessment" and if a notional "fund" is created. Op. 20 n.9. The assertion of these remarkable principles confirms the need for granting the writ; the Federal Circuit's assertion of exclusive jurisdiction over these retrospectivity cases where the United States is a party (Pet. 28; ComEd Pet. 10) intensifies that need.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition for Certiorari should be granted.

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[9] *Turner Elkhorn*, 428 U.S. at 16.

Respectfully submitted.

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